

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

TEXAS, WISCONSIN, ALABAMA,  
ARKANSAS, ARIZONA, FLORIDA,  
GEORGIA, INDIANA, KANSAS,  
LOUISIANA, PAUL LePAGE, Governor of  
Maine, Governor Phil Bryant of the State of  
MISSISSIPPI, MISSOURI, NEBRASKA,  
NORTH DAKOTA, SOUTH CAROLINA,  
SOUTH DAKOTA, TENNESSEE, UTAH,  
WEST VIRGINIA, NEILL HURLEY, and  
JOHN NANTZ,

Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED  
STATES DEPARTMENT OF HEALTH AND  
HUMAN SERVICES, ALEX AZAR, in his  
Official Capacity as SECRETARY OF  
HEALTH AND HUMAN SERVICES,  
UNITED STATES INTERNAL REVENUE  
SERVICE, and DAVID J. KAUTTER, in his  
Official Capacity as Acting COMMISSIONER  
OF INTERNAL REVENUE,

Defendants.

Civil Action No. 4:18-cv-  
00167-O

CALIFORNIA, CONNECTICUT, DISTRICT  
OF COLUMBIA, DELAWARE, HAWAII,  
ILLINOIS, KENTUCKY,  
MASSACHUSETTS, MINNESOTA by and  
through its Department of Commerce, NEW  
JERSEY, NEW YORK, NORTH CAROLINA,  
OREGON, RHODE ISLAND, VERMONT,  
VIRGINIA, and WASHINGTON,

Intervenor-Defendants.

**INTERVENOR STATES' RESPONSE TO JULY 16, 2018  
COURT ORDER**

The Intervenor States submit this response to the Court's July 16, 2018 Order directing the parties "to file any additional information they wish to present in opposition to considering" the issues raised by the briefing on Plaintiffs' Application for a Preliminary Injunction "on summary judgment." ECF No. 176. The Intervenor States understand that Order not as a request to present additional evidence or arguments they might submit in support of (or in opposition to) a motion for summary judgment, but instead a request to identify for the Court what evidence and argument they might wish to raise during summary judgment briefing.

The Intervenor States respectfully submit that this Court should not convert the briefing on the preliminary injunction application into a motion for summary judgment. The Intervenor States' opposition to the application for a preliminary injunction focused on the legal and evidentiary standards that govern that relief. At the summary judgment stage, however, the Intervenor States would be afforded an opportunity to more fully brief legal issues that the preliminary injunction legal standard and page limitations did not permit previously. These issues include, but are not limited to: (1) whether Plaintiffs have Article III standing to challenge the constitutionality of the minimum coverage provision; (2) whether the minimum coverage requirement under 26 U.S.C. § 5000A may now be sustained under the Commerce Clause, *see* State Defendants' Br. in Opp. to Plaintiffs' Application for a Preliminary Injunction, ECF No. 91, at 18 n.17; (3) whether an injunction limited to the 20 Plaintiff States is legally supportable and whether it would harm the Intervenor States,<sup>1</sup> (4) whether regulations promulgated under the Affordable Care Act remain

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<sup>1</sup> The Plaintiff States requested this narrower injunctive relief for the first time in their Preliminary Injunction Reply Brief. *See* ECF No. 175 at 29-30.

lawful if the minimum coverage provision, or any other provisions, are struck down; (5) whether the Supreme Court’s “modern severability precedents” are consistent with “longstanding limits on judicial power,” *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring); and (6) whether Plaintiffs can meet their burden of demonstrating that they are entitled to a permanent injunction, *see, e.g.*, *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (identifying factors that a plaintiff seeking permanent injunctive relief must satisfy).

If the Court nevertheless intends to move straight to summary judgment at this time, it should permit the parties the opportunity to submit supplemental briefing which will enable the parties to place all of the legal and factual issues in this case before the Court.<sup>2</sup> *See Underwood v. Hunter*, 604 F.2d 367, 369 (5th Cir. 1979) (when only a preliminary injunction is pending, “we cannot say with assurance that the parties will present everything they have. The very intimation of mortality when summary judgment is at issue assures us that the motion will be rebutted with every factual and legal argument available.”). Based upon all of the foregoing, the Intervenor States—in agreement with the Plaintiffs—urge the Court to decline the Federal Defendants’ invitation to convert the pending preliminary injunction application into another motion. If the Court determines that summary judgment is appropriate at this time, however, the Intervenor States respectfully request that the Court grant the parties a 30-day period to file supplemental briefing on the additional issues identified above (and perhaps others).

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<sup>2</sup> Whether the Court rules on the merits under the preliminary injunction standard or under the summary judgment framework, the Court’s ruling should be a final appealable order or a final judgment so that the parties may promptly seek appellate review.

Dated July 30, 2018

Respectfully submitted,

XAVIER BECERRA  
Attorney General of California  
JULIE WENG-GUTIERREZ  
Senior Assistant Attorney General  
KATHLEEN BOERGERS  
Supervising Deputy Attorney General  
NIMROD P. ELIAS  
Deputy Attorney General

/s/ Neli N. Palma

NELI N. PALMA  
Deputy Attorney General  
California State Bar No. 203374  
1300 I Street, Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2550  
Telephone: (916) 210-7522  
Fax: (916) 322-8288  
E-mail: Neli.Palma@doj.ca.gov  
*Attorneys for Intervenors-Defendants*

GEORGE JEPSEN  
Attorney General of Connecticut  
JOSEPH R. RUBIN  
Associate Attorney General  
*Attorneys for Intervenor-Defendant the  
State of Connecticut*

MATTHEW P. DENN  
Attorney General of Delaware  
ILONA KIRSHON  
Deputy State Solicitor  
DAVID J. LYONS  
Deputy Attorney General  
*Attorneys for Intervenor-Defendant the  
State of Delaware*

RUSSELL A. SUZUKI  
Attorney General of Hawaii  
HEIDI M. RIAN  
Deputy Attorney General  
ROBERT T. NAKATSUJI  
Deputy Solicitor General  
*Attorneys for Intervenor-Defendant the  
State of Hawaii*

LISA MADIGAN  
Attorney General of Illinois  
DAVID F. BUYSSE  
Deputy Chief, Public Interest Division  
ANNA P. CRANE  
Public Interest Counsel  
MATTHEW V. CHIMENTI  
Assistant Attorney General, Special  
Litigation Bureau  
*Attorneys for Intervenor-Defendant the  
State of Illinois*

ANDY BESHEAR  
Attorney General of Kentucky  
LA TASHA BUCKNER  
Executive Director, Office of Civil and  
Environmental Law  
S. TRAVIS MAYO  
TAYLOR PAYNE  
Assistant Attorneys General  
*Attorneys for Intervenor-Defendant the  
Commonwealth of Kentucky*

MAURA HEALEY  
Attorney General of Massachusetts  
STEPHEN P. VOGEL  
Assistant Attorney General  
*Attorneys for Intervenor-Defendant the  
Commonwealth of Massachusetts*

OFFICE OF THE ATTORNEY GENERAL  
State of Minnesota  
SCOTT IKEDA  
Assistant Attorney General  
*Attorneys for Intervenor-Defendant the  
State of Minnesota by and through its  
Department of Commerce*

GURBIR S. GREWAL  
Attorney General of New Jersey  
JEREMY M. FEIGENBAUM  
Assistant Attorney General  
ANGELA JUNEAU BEZER  
Deputy Attorney General  
*Attorneys for Intervenor-Defendant the  
State of New Jersey*

BARBARA D. UNDERWOOD  
Acting Attorney General of New York  
STEVEN C. WU  
Deputy Solicitor General  
LISA LANDAU  
Bureau Chief, Health Care Bureau  
ELIZABETH CHESLER  
Assistant Attorney General, Health Care  
Bureau  
*Attorneys for Intervenor-Defendant the  
State of New York*

JOSHUA H. STEIN  
Attorney General of North Carolina  
SRIPRIYA NARASIMHAN  
Deputy General Counsel  
*Attorneys for Intervenor-Defendant the  
State of North Carolina*

ELLEN F. ROSENBLUM  
Attorney General of Oregon  
HENRY KANTOR  
Special Counsel to the Attorney General  
SCOTT KAPLAN  
Assistant Attorney General  
*Attorneys for Intervenor-Defendant the  
State of Oregon*

PETER KILMARTIN  
Attorney General of Rhode Island  
MICHAEL W. FIELD  
Assistant Attorney General  
MARIA R. LENZ  
Special Assistant Attorney General  
*Attorneys for Intervenor-Defendant the  
State of Rhode Island*

THOMAS J. DONOVAN, JR.  
Attorney General of Vermont  
BENJAMIN D. BATTLES  
Solicitor General  
*Attorneys for Intervenor-Defendant the  
State of Vermont*

MARK R. HERRING  
Attorney General of Virginia  
TOBY J. HEYTENS  
Solicitor General  
MATTHEW R. MCGUIRE  
Deputy Solicitor General  
*Attorneys for Intervenor-Defendant the  
Commonwealth of Virginia*

ROBERT W. FERGUSON  
Attorney General of Washington  
JEFFREY G. RUPERT  
Chief, Complex Litigation Division  
JEFFREY T. SPRUNG  
Assistant Attorney General  
*Attorneys for Intervenor-Defendant the  
State of Washington*

KARL A. RACINE  
Attorney General for the District of  
Columbia  
ROBYN R. BENDER  
Deputy Attorney General  
VALERIE M. NANNERY  
Assistant Attorney General  
*Attorneys for Intervenor-Defendant the  
District of Columbia*